No. ~~19018~~ 20908

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERLE G. SWANSON and
HELEN F. SWANSON,
husband and wife,

Appellants,

v.

COMMERCIAL ACCEPTANCE
CORPORATION, a Missouri
corporation,

Appellee.

FILED
SEP 22 1966
WM. B. LUCK CLERK

APPELLEE'S BRIEF

Appeal from the United States District Court for the
District of Oregon

THE HONORABLE WILLIAM G. EAST, Judge

BORDEN F. BECK, JR.
BLACK & APICELLA
400 Selling Building
Portland, Oregon 97205

Attorneys for Appellee

CERTIFIED A TRUE COPY

By Borden F. Beck Jr.
Of Attorneys for Appellee

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Treatises

No. 19018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERLE G. SWANSON and
HELEN F. SWANSON,
husband and wife,

Appellants,

v.

COMMERCIAL ACCEPTANCE
CORPORATION, a Missouri
corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the
District of Oregon

THE HONORABLE WILLIAM G. EAST, Judge

STATEMENT OF JURISDICTION

Appellee accepts appellants' statement of jurisdiction.

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee generally concurs in the statement of the facts of this case as presented by appellants in their brief; however, certain findings of fact by the Court, and facts stipulated by the parties, were omitted in appellants' statement which are of paramount importance to the final determination of the case, and

are, therefore, included hereinbelow.

The Fuline Corporation is a totally separate and distinct corporate entity from the appellee, with neither corporation owning any interest in the other, and there does not now exist, nor has there existed, any common director or officer of the two corporations (R. 52, 89). Prior purchases of negotiable paper by appellee from Fuline had been in the regular course of business and on a transaction-by-transaction basis (R. 63, 82). Prior to the time appellants and Fuline agreed upon the purchase and sale of the equipment involved herein, appellee had no knowledge of the representations which Fuline may have made to induce the purchase of said equipment by appellants (R. 64, 82). Fuline's negotiations for and decision to sell equipment to the appellants, and Fuline's acceptance of the purchase price notes and mortgages, together with the other terms and conditions of the purchase and sale, were made solely by Fuline upon its own responsibility and were not subject in any respect to the control of the appellee (R. 82, 90).

At the time said sales of equipment from Fuline to appellants were consummated and said notes and chattel mortgages were executed by appellants and delivered to Fuline, Fuline could have transferred said notes and mortgages to any person whomsoever as determined by Fuline in its sole discretion and Fuline was not required or obligated to sell or transfer said notes and chattel mortgages to appellee (R. 64, 83). After appellants and Fuline agreed on May 1, 1962, to the purchase and sale of said equipment and before June 13, 1962, when Fuline sold to appellee the said note and chattel mortgage dated June 12, 1962, Fuline was dealing and negotiating with another finance company, Northern Finance Corporation, regarding the purchase of said commercial paper of appellants (R. 65, 83 and Exs. 73, 110 and 111). Said Northern

Finance Corporation was a distinct corporate entity from appellee (R. 65, 83 and Ex. 73 - p. 4, item 14).

At no time prior to the agreement between Fuline and the appellants for the purchase and sale of the equipment involved herein, and at no time prior to the purchase of the notes and chattel mortgages in question by appellee from Fuline, did appellee's counsel, consult with, or have any direct dealings with the appellants or in any way make any representation to appellants regarding said equipment (R. 52, 90).

The promissory notes in question were made payable at the address of Fuline, and not that of appellee (R. 52 - Item 24). The notes and mortgages in question were delivered by Fuline to the actual possession of appellee which purchased the said notes and mortgages from Fuline by giving value therefor to Fuline at the time of their respective purchase by appellee which has, at all times since such respective purchases and deliveries of said notes and mortgages to appellee, been and is in possession of said notes and mortgages (R. 47, 48, 89).

Commerce Acceptance Company, Inc. (hereinbelow sometimes referred to as "Commerce") was the nominal original endorsee of the notes here in question. It is the holder of 100% of the stock of the appellee, and while Commerce and appellee have a common officer, they are separate legal entities engaged in separate businesses. At no time did Commerce (a) purchase or agree to purchase from Fuline the notes and chattel mortgages in question, (b) pay or give, or agree to pay or give, to Fuline any consideration whatsoever in payment for said notes and chattel mortgages, or (c) receive possession of said notes and chattel mortgages. At no time did appellants, Fuline, appellee or Commerce contemplate or intend that the notes and mortgages were to be purchased or

transferred to Commerce. The appellants at all times made payments directly to appellee, and continued to make those payments to appellee of the installments due under the notes after appellants became aware of the matters upon which they base their contention that the machines were faultily constructed (R. 48, 49, 51, 90, 91).

Each of the said promissory notes was endorsed by Fuline to appellee by execution of the writing on the reverse side of each of said respective notes, and said endorsements inadvertently misspelled and wrongly designated the name of appellee, Commercial Acceptance Corporation, as "Commerce Acceptance Company, Inc." (R. 64, 83). Each of the said chattel mortgages was assigned by Fuline to appellee by the execution of a writing on the second page of each of said chattel mortgages below the word "ASSIGNMENT" and said assignments inadvertently misspelled and wrongly designated the name of appellee, Commercial Acceptance Corporation, as "Commerce Acceptance Company, Inc." (R. 64, 83). The blank spaces in the forms of chattel mortgages and forms of notes which were used by Fuline and appellants in this transaction were filled in by Fuline and/or appellants and not by appellee (R. 64, 83). When appellee purchased said notes and mortgages from Fuline, Fuline executed the "Assignment" attached to each said chattel mortgage and the endorsement on the back of each said note with the intention and understanding of Fuline and appellee that the assignee of said chattel mortgages, and the endorsee of said promissory notes, was appellee (R. 65, 83).

As stated by appellants in their brief, the trial court concluded as a matter of fact that the naming and designating of Commerce Acceptance Company, Inc., was due to the mutual mistake and inadvertence of Fuline and appellee, and it was the mutual understanding and intention of the appellants, appellee and Fuline

that if notes were sold to appellee they were to be transferred to it by proper endorsements and assignments by Fuline (R. 92).

In addition, the trial court concluded as a matter of fact that Commerce Acceptance Company, Inc., never had any interest or claim to the notes or their securing mortgages, and that the mistake and inadvertent endorsement of the notes and transfer of the mortgages by Fuline to Commerce has not caused any change of appellants' position as maker, or otherwise worked to their additional loss or prejudice (R. 92).

STATUTES INVOLVED

The four states with any possible connection to the transactions involved herein, and to the issue presently before the court, are Missouri (the place of endorsement and delivery of the notes by Fuline to Commercial Acceptance), Washington (the place of execution by appellants of the notes and chattel mortgages and the location of some of the property subject to the chattel mortgages), Oregon (the place where the action was brought and the location of some of the property subject to the chattel mortgages), and Kansas (the place where the notes were made payable, and the place of inadvertent endorsement to Commerce).

At all times relevant to this action, the Uniform Negotiable Instruments Law (hereinafter referred to as the "N.I.L.") was in effect (with minor modifications) in all four of said states and thus any possible question of conflict of laws is minimal. The court below declined to deal with any conflicts issues for this reason (R.93). Set forth in Appendix "A" are the provisions of the N.I.L. which are relevant to this matter with citations given to those provisions (or modifications thereof) as codified in

Missouri, Washington, Oregon and Kansas.

SUMMARY OF ARGUMENT

I. The trial court's findings and conclusions of fact should not be disturbed since they are supported by the record and are not clearly erroneous.

II. The Negotiable Instruments Law is applicable to this transaction and appellee took appellants' notes in "good faith" so as to become a holder in due course and thereby entitled to recover from appellants. This conclusion is fully supported by the facts of this case, the weight of well reasoned judicial authority and by the recognized public policy underlying the N.I.L.

III. Since appellee purchased appellants' notes from Fuline for value and took possession and delivery thereof from Fuline, and since it was understood and intended that the notes were endorsed by Fuline to appellee, appellee's status as a holder in due course is not defeated by the fact that the printed text of the endorsement on each of the notes shows the name of the endorsee to be "Commerce Acceptance Company, Inc." Such designation of the endorsee was inadvertent and expressly covered by N.I.L. Sections 43 or 9. The sole authority relied upon by appellants in support of their position that "there was no proper endorsement" to appellee, is inapplicable upon the facts and is based upon Section 42 of the N.I.L. which has no applicability whatsoever to the present case.

ARGUMENT

I. SINCE THE TRIAL COURT'S FINDINGS OF FACT WERE FULLY SUPPORTED BY THE RECORD AND WERE NOT CLEARLY ERRONEOUS, THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE DISTURBED.

Inasmuch as the arguments made in appellants' brief depend

largely upon appellants' attempts to ignore, or overrule, the express findings of fact of the trial court, it becomes appropriate to determine the scope of this court's review.

The findings of fact of a trial judge where an action is tried without a jury will not be set aside unless clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure (28 U.S.C.)

While at one time in the past, the cases were in considerable confusion with respect to whether Rule 52(a) applied where the trial court's findings were based on undisputed facts, this court settled the question in Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962), in which it was held that the Ninth Circuit would follow the reasoning of the Supreme Court in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 80 S.Ct. 1190, 4 L. Ed. 2d 1218 (1960). Thus, it is now settled that the findings of a trial court will not be disturbed unless clearly erroneous, even where those findings are based on undisputed testimony, and that the scope of review is limited to the application of the law. See also United States v. First Security Bank, 334 F.2d 120 (9th Cir. 1964); Stauffer Laboratories, Inc. v. Federal Trade Commission, 343 F.2d 75 (9th Cir. 1965); Azevendo v. Commissioner of Internal Revenue, 246 F.2d 196 (9th Cir. 1957); Randall Foundation, Inc. v. Riddell, 244 F.2d 803 (9th Cir. 1957).

Applying these decisions and Rule 52(a) to our case, this court is bound by the findings and conclusions of fact in the court below and those findings and conclusions of fact should not be overturned unless they are clearly erroneous.

As will be seen below, this limitation on the scope of review of this court becomes relevant on both major points advanced in appellants' brief. Thus appellants admit appellee's "good faith" in the transactions in question, but they then proceed to assert that appellee actively participated in the transaction between Fuline

and appellants in due course. This assertion of appellants is directly contrary to the trial court's conclusion that appellee (a) did not actively participate in the transaction between Fuline and appellants so as to become a party to their transaction and (b) did not otherwise lack "good faith," so as to defeat appellee's status as a holder in due course (R. 97). These conclusions of fact were amply supported by the evidence and by the trial court's findings of fact. See Supplemental Statement of The Case hereinabove

Similarly, in their argument that the original endorsement by Fuline was defective so as to defeat appellee's status as a holder in due course, appellants are in effect asking this court to ignore or overrule the express findings and conclusions of fact of the trial court as to (a) the intentions of the parties, (b) the mutual mistake and inadvertence when the original endorsement was made, and (c) the fact that appellee's name as endorsee was inadvertently misspelled and wrongly designated. (See Supplemental Statement of the Case hereinabove and R. 92, 64, 83.)

Similarly, in asserting on page 18 of their brief that, prior to its purchase of the commercial paper in question, appellee had a "contractual duty" to purchase such paper, appellants ignore the fact that no such contractual duty was found by the trial court and also ignore the findings and conclusions of fact by the trial court to the effect that prior to the actual sale of the paper to appellee Fuline had no obligation to sell the paper to appellee (R. 82, 64).

It is submitted, that this case may be easily resolved in favor of appellee by applying to appellants' argument the established rule limiting the scope of this court's review of the trial court's findings and conclusions of fact. Since those findings and conclusions of fact are not clearly erroneous, they

must stand.

II. THE NEGOTIABLE INSTRUMENTS LAW APPLIES TO THIS TRANSACTION. APPELLEE TOOK THE NOTES IN GOOD FAITH AND IS A HOLDER IN DUE COURSE ENTITLED TO RECOVER FROM APPELLANTS.

Appellants' argument that the Negotiable Instruments Law (hereinafter sometimes referred to as the "N.I.L.") is inapplicable to this transaction is entirely erroneous and completely unsupported. Of the seven cases cited by appellants to support their argument that the N.I.L. doesn't apply, four of the cases explicitly involved the application of the N.I.L. and each was decided on the respective court's own interpretation of the N.I.L. as applied to the facts before it. Commercial Credit Corporation v. Orange County Machine Works, 34 Cal. 2d 766, 214 P.2d 819 (1950); Mutual Finance Company v. Martin, (Fla.) 63 So. 2d 649 (1953); United States v. Klatt, 135 F. Supp. 648 (S.D. Cal. 1955); International Finance Corporation v. Rieger, ____ Minn. ____, 137 N.W. 2d 172 (1965). Two of the other cases cited by appellants are only brief decisions which indicate, at least by implication, that the "good faith" concept under the N.I.L. was being applied. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W. 2d 260 (1940); Industrial Credit Company v. Mike Bradford & Co., Inc., (Fla.), 177 So. 2d 878 (1965). The other case cited by appellants was not concerned with the N.I.L. because it involved a usurious contract which was void at its inception under the Arkansas law relating to usury. Schuck v. Murdock Acceptance Corporation, 220 Ark. 56, 247 S.W. 2d 1 (1952).

In arguing that "the N.I.L. doesn't apply," appellants indicate that they rely heavily upon their assertion of the fact (an assertion contrary to the specific conclusion of the trial court) that appellee actively and directly participated in the transaction between appellants and Fuline. Even a cursory analysis

of the cases relied upon by appellants, shows that this is really an argument that appellee did not act in "good faith" under the applicable rules of the N.I.L. Since, however, the trial court specifically found that appellee did act in "good faith" under the applicable standards of the N.I.L. (R. 97, 63, 82), and since appellants admit in their brief herein (p. 9) that they "are making no claim here, nor did they make any claim in the lower court that there was any lack of good faith on the part of the appellee," it has apparently become necessary for appellants to ignore the fact that the issue they attempt to raise is one of "good faith" under the N.I.L. and not a point of fact or law outside the N.I.L.

We submitted that the N.I.L. does apply to the transactions involved herein and that not only did appellants not sustain their burden to prove that appellee did not take the notes in "good faith," but also the facts and the applicable law clearly support a finding that appellee did take the notes in good faith. Appellee's position as a holder in due course is further supported by the strong public policy behind the N.I.L. favoring a free flow of honest credit to honest businesses.

There have been many cases decided in this country involving the question of the status of financial institutions as holders in due course of commercial paper purchased from sellers of industrial equipment and consumer goods. When the facts and holdings in these cases are closely analyzed, it is clear that the weight of authority and the better reasoned authority supports the position of appellee as a holder in due course under the facts involved herein. Since the courts have examined various factors in their decisions which are present here, we shall attempt to do the same.

First, it should be recognized that the general rule under the N.I.L. is that a holder in due course is not subject to

the defense of misrepresentation, failure of consideration or breach of warranty. United States v. Bryant, 58 F. Supp. 663 (S.D. Fla. 1945), aff'd 157 F.2d 767 (5th Cir. 1946); Advance-Rumley Thresher Co. v. West, 108 Kan. 875, 196 Pac. 1061 (1921); United States National Bank v. Floss, 38 Or. 68, 62 Pac. 751 (1900); Clarinda Trust & Savings Bank v. Doty, 83 Or. 214, 163 Pac. 418 (1917); Intges v. People's Finance & Trust Co., (Tex. Civ. App.) 44 S.W. 2d 1028 (1931); Yakima Finance Corp. v. Mullins, 138 Wash. 553, 245 Pac. 5 (1926).

The fact that a note and chattel mortgage (or other securit instrument) are executed concurrently or are on the same piece of paper (and especially where, as is the case here, the note can be detached from the mortgage), has repeatedly been held not to defeat a holder's status as a holder in due course. Implement Credit Corp. v. Elsinger, 268 Wis. 143, 66 N.W. 2d 657 (1954), reh. den. 67 N.W. 2d 873 (1955); National Bond & Investment Company v. Lanners, 253 Ill. App. 262 (1929); Morgan v. Mulcahey, (Mo.) 298 S.W. 242 (1927); Commercial Credit Corporation v. Orange County Machine Works, 34 Cal. 2d 766, 214 P.2d 819 (1950); Mutual Finance Co. v. Martin, (Fla.) 63 So. 2d 649 (1953); White System of New Orleans, Inc. v. Barganier, (La.) 172 So. 2d 741 (1965).

The fact that appellee received a copy of appellants' financial statement for purposes of reviewing their credit in no way defeats the status of appellee as a holder in due course. Thus, the courts have generally held a transferee's investigation of a chattel purchaser's financial standing not only does not defeat a transferee's holder in due course status, but it also supports a finding of a transferee's good faith in the transaction. Commercial Credit Corporation v. Smith, 143 Misc. 478, 256 N.Y.S. 759 (1932); Intges v. People's Finance & Trust Co. (Tex. Civ. App.)

44 S.W. 2d 1028 (1931); White System of New Orleans, Inc. v. Barganier, (La.) 172 So. 2d 741 (1965). Had appellee not approved appellants' credit in advance, appellants would probably now be asserting that such failure would defeat appellee's status as a holder in due course, citing the Intges decision as authority.

The fact that a transferee has furnished a seller with forms of instruments for execution by a chattel purchaser has repeatedly been treated by the courts as not preventing a transferee from being a holder in due course. Implement Credit Corporation v. Elsinger, 268 Wis. 143, 66 N.W. 2d 657 (1954), reh. den. 67 N.W. 2d 873 (1955); White System of New Orleans, Inc. v. Hall, 219 La. 440, 53 So. 2d 227 (1951); Mann v. Leasko, 179 Cal. App. 2d 692, 4 Cal. Rptr. 124 (1960); James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 198 A.2d 98 (1964); White System of New Orleans, Inc. v. Barganier, (La.) 172 So. 2d 741 (1965).

The fact that a transferor and transferee have dealt together previously and either have a regular financing arrangement or have dealt together before on a transaction-by-transaction basis have been recognized by the courts as not depriving the transferor of its holder in due course status with respect to commercial paper purchased by it from the transferee. Implement Credit Corp. v. Elsinger, 268 Wis. 143, 66 N.W. 2d 657 (1954), reh. den. 67 N.W. 2d 873 (1955); Mann v. Leasko, 179 Cal. App. 2d 692, 4 Cal. Rptr. 124 (1960); Singer v. National Bond & Investment Co., 218 Ala. 375, 118 So. 561 (1928); Mutual Finance Corporation v. Dickerson, 123 N.J.L. 62, 7 A.2d 859 (1938); New Jersey Mortgage & Investment Corp. v. Calvetti, 68 N.J. Super. 18, 171 A.2d 321 (1961); International Finance Co. v. Magilansky, 105 Pa. Super. 309, 161 Atl. 613 (1932); Commercial Credit Corporation v. Smith, 143 Misc. 478, 256 N.Y.S. 759 (1932). The fact that appellee purchased a great deal of

commercial paper in the ordinary course of its business and that only a relatively small portion of such purchases was made from Fuline, further supports appellee's "good faith" and its status as a holder in due course with respect to appellants' paper. Cf. Barnard, Phillips Factors, Inc. v. Kaplan Silk Corporation, 28 N.Y.S. 2d 696 (1939), aff'd 28 N.Y.S. 2d 699 (1941).

The fact that a finance company has agreed with the seller, prior to the making of a sale that it would finance the transaction by purchasing a note of the purchasers, does not prevent the purchaser of the notes as being regarded as a holder in due course. White System of New Orleans, Inc. v. Hall, 219 La. 440, 53 So. 2d 227 (1951); Morgan v. Mulcahey, (Mo.) 298 S.W. 242 (1927); National Bond & Investment Co. v. Miller, (Mo.) 76 S.W. 2d 703 (1934). In James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 198 A.2d 98 (1964), a very well reasoned opinion holds that lack of good faith to defeat holder in due course status of a finance company is not demonstrated merely because a finance company entered into an arrangement with a manufacturer's agent whereby the finance company subsequently purchased from the manufacturer's agent commercial paper of third parties executed after the discounting arrangement was entered into. A close analysis of New Jersey Mortgage and Investment Corp. v. Calvetti, 68 N.J. Super. 18, 171 A.2d 321, 327 (1961) also shows that the court there considered that the date the ultimate purchaser of notes was first approached as to purchase was "patently irrelevant" to the question of notice and the purchaser's "bad faith." Another case in which a finance company's agreement to purchase commercial paper prior to the execution and giving thereof did not defeat the finance company's status as a holder in due course who purchased the paper in good faith is Universal C.I.T. Credit Corporation v. Alker, 239 La. 1057, 121 So. 2d 78 (1960). See, also, Singer v. National Bond &

Investment Co., 218 Ala. 375, 118 So. 561, 562 (1928).

At page 18 of their brief before this court, appellants state, as though it were a fact (which it is not), that appellee had a "contractual duty and obligation" to purchase the notes in question. No such contention was made by appellants in the Pre-Trial Order and the uncontroverted testimony and the finding of the trial court was that Fuline, prior to the actual transfer of the notes to appellee for value, had no obligation to sell the notes to appellee. It is important to recognize that appellants' reiterated statements to the effect that appellee was "committed to purchase" appellants' paper are not supported by the record, by the trial court's findings, or by applicable law. The most that can possibly be made of the facts of this case is that appellee may have made an oral offer to buy the paper before it was written but such an offer would not have been a contract until it was accepted and it clearly was not accepted until long after appellants and Fuline had entered into their sales transaction. Further, even if appellee had in some way been committed to purchase appellants' first note, such commitment would appear to have been terminated by Fuline's entering into negotiations with Northern Finance Corporation for the purchase and sale of said note (R. 65, 83 and Exs. 73, 110 and 111). In all events, the above cited cases make it clea that even if appellee had been legally obligated to purchase said notes, such fact would not be a proper basis for depriving appellee of its holder in due course status.

In those cases where transferors have been found not to be holders in due course of commercial paper purchased from dealers, there has been most frequently involved situations where the dealer had committed some fraud upon his buyer with respect to the sale of

property (usually consumer goods) and where the transferor has some actual, or constructive, knowledge of the fraud. In the present case the claim for rescission is based primarily on breach of warranty and there is no serious claim of fraud against Fuline. Further, there is no contention or testimony to indicate that appellee had, at the time it purchased the notes, any knowledge of (or had participated in) any breach of warranty or any fraud by Fuline. In fact, the testimony and findings of the trial court are to the contrary (R. 52, 64, 82). Under circumstances where the transferor has not had knowledge of, and has not participated in, any fraud of the seller, or has not engaged in sharp practices itself with respect to the seller, the courts are not readily inclined to deprive a transferee of his holder in due course status. See, e.g., Morgan v. Mulcahey, (Mo.) 298 S.W. 242 (1927); Commercial Credit Corporation v. Smith, 143 Misc. 478, 256 N.Y.S. 759 (1932); Clarinda Trust & Savings Bank v. Doty, 83 Or. 214, 163 Pac. 418 (1917); Wilson v. Gorden, (D.C. Mun. App.), 91 A.2d 329 (1952); New Jersey Mortgage and Investment Corp. v. Calvetti, 68 N.J. Super. 18, 171 A.2d 321 (1961). As stated in Mann v. Leasko, 179 Cal. App. 2d 692, 4 Cal. Rptr. 124, 126 (1960):

> "It has been uniformly held that the requirement of 'good faith,' imposed by the Negotiable Instruments Law, generally means that the transaction was honestly conceived and consummated without collusion, fraud, knowledge of fraud, or intent to assist in the perpetration of fraud."

All of the cases which appellants cite in support of their position are not only overcome by the weight of reasoned authority contrary to appellants' position but, as is shown below, said cases cited by appellants are also distinguishable in other ways to make them inapplicable here:

Contrary to appellants' erroneous assertion on page 12 of their brief, the facts involved in Mutual Finance Company v. Martin, (Fla.) 63 So. 2d 649 (1953), are distinguishable from our case in many important regards including the following:

(1) In Mutual Finance the finance company's office was designated in the note as the place of payment. In our case, Fuline's office was designated in the note as the place of payment.

(2) In Mutual Finance the finance company investigated the credit of the buyer one day, the deal was closed the next day, and the notes were transferred on the following day. In our case, the appellants' credit was reviewed in late April, the contract was entered into between appellants and Fuline in early May and the notes were not sold and endorsed to appellee until June.

(3) In Mutual Finance the seller was a substantial shareholder of the finance company, and seller represented that the finance company would finance the transaction. In our case, there was no connection between appellee and Fuline and no representations were made by, or for, appellee of the kind made in Mutual Finance.

(4) In Mutual Finance the court speaks of the finance company counseling and aiding the seller from the inception of the transaction. In our case, no such counsel or aid was given, and, in fact, Fuline was negotiating with another finance company to purchase appellants' paper. Further, appellee had no knowledge of any representations of Fuline to appellants.

(5) In Mutual Finance the seller was dealing only with one finance company with all its paper, and in our case, appellants have shown no such fact to exist and, in fact, after having talked

to appellee, Fuline actually negotiated to sell appellants' paper to Northern Finance Corporation thereby relieving appellee of any obligation to purchase appellants' paper. A similar distinction has been made of the Mutual Finance decision in Citizens and Southern National Bank v. Stepp, 126 F. Supp. 744 (N.D. Fla. 1954).

(6) Mutual Finance involved the sale of consumer goods and the court showed great concern for consumers. In our case, the sales involved were large sales of equipment to a businessman and one whom the courts are less inclined to protect at the expense of other innocent parties.

(7) In Mutual Finance the court was concerned with the problem of how to protect against "unscrupulous dealers." In our case, there is no suggestion that Fuline was "unscrupulous" and, in fact, the Exhibits on file show the great amount of cooperation given appellants by Fuline. Further, Fuline contended in the Pre-Trial Order that, shortly before they first claimed the right to rescind, appellants were considering buying more equipment from Fuline and requesting refinancing of old equipment (R. 61).

(8) In Mutual Finance the name of the finance company is shown prominently at the top and throughout the face of the contract and note. In our case, the name of appellee is not in the face of the note or mortgage (although its misdesignated name "Commerce Acceptance Company, Inc." is set forth without undue prominence in the printed endorsement to the note and assignment to the mortgage).

The case of Schuck v. Murdock Acceptance Corp., 220 Ark. 56, 247 S.W. 2d 1 (1952) (cited at page 13 of appellants' brief) is completely inapplicable to our case. In Schuck the issue was

usury and the N.I.L. was not applicable because a usurious contract is void in Arkansas. Further the dealer in Schuck was found to be the agent of the finance company (the dealer investigated the credit; the finance company gave the dealer a bonus each year; and the finance company paid the dealer for his services in the transaction). The appellants in our case are not contending that Fuline was the agent of appellee.

The facts involved in Commercial Credit Corporation v. Orange County Machine Works, 34 Cal. 2d 766, 214 P.2d 819 (1950) (cited at page 11 of appellants' brief) are distinguishable from the present case in several important regards, including the following:

(1) In Orange County Machine Works the finance company knew at the time it purchased the buyer's notes, that the equipment involved did not belong to the dealer and had not been delivered to the buyer. This was obviously critical to the court because the manufacturer never delivered the equipment to the buyer when the dealer's check bounced. Such critical facts are not involved in our case.

(2) In Orange County Machine Works the court held that the finance company "knew all of the details of the transaction" and that "the finance company was a moving force in the transaction from its very inception." In our case, it is clear that appellee did not know all of the details of the transaction between appellants and Fuline and that appellee was not "a moving force in the transaction from its inception." In our case, almost six weeks transpired from the time appellee was contacted until appellee purchased the notes and during that time (and without any knowledge

of or guidance by appellee), Fuline and appellants entered into their various contractual arrangements, Fuline prepared and executed the commercial documents and Fuline conducted negotiations with Northern Finance Corporation to purchase the appellants' paper.

In citing United States v. Klatt, 135 F. Supp. 648 (S.D. Cal. 1955), at page 14 of their brief in support of their position, appellants disregard the critical facts which caused the court to hold that the Bank of America was not a holder in due course in that case. The actual holding of the case was that the plaintiff to whom a note had been assigned by the Bank of America after default, was not a holder in due course because it took the note after maturity and with notice of defects and that the Bank, through which plaintiff derived title, was also not a holder in due course. In concluding that the Bank was not a holder in due course, the key fact obviously is that the Bank had notice that the loan and the note evidencing the debt were subject to a requirement that an executed completion certificate was required which the court held was not received. What the relationship of the Bank was to the "entire transaction" and to the blatant fraud involved, is not fully shown, but without such a showing, we submit that the Klatt case is not a relevant to the facts of our case. For a similar analysis of the Klatt case by the trial court, see R. 95, 96.

The case of Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W. 2d 260 (1940) cited at page 13 of appellants' brief is distinguishable from our case in the following regards:

(1) In Childs the court merely decided that there was

enough evidence for the jury to have reached its decision (and the court did not analyze closely the underlying legal issue with which we are concerned).

(2) The Childs case involved extensive fraud by an automobile dealer upon a consumer (apparently with the accompanying sympathy of judge and jury without consideration of the public policy of the N.I.L.).

(3) The finance company prepared the note in Childs.

(4) The court, in Childs, found that the finance company had put the dealer in position to procure the consumer's signature through fraudulent misrepresentation.

Appellants cite two recent cases which they contend support their position that the N.I.L. is not applicable. Neither is persuasive here, and in fact, dicta in one of them weighs strongly in favor of the appellee, when applied to the facts of this case.

Thus, in International Finance Corporation v. Rieger, ___ Minn. ___, 137 N.W. 2d 172 (1965), cited at page 13 of appellants' brief, the court held that the plaintiff finance company had actual knowledge from the inception of the transaction that the liability of the maker of the promissory note sued on was conditional upon the performance of the contract by the payee, and in addition had knowledge of the breach. In our case, there is no contention by appellants that the notes were conditional, and such is clearly not the case. Even if it were, the agreed facts are that Fuline dealt with appellants independently of appellee at all times, and there is no claim or showing of any actual or constructive knowledge by appellee of liability on the notes being contingent on conditions to be performed by Fuline.

In addition, there was in International Finance a forged certificate of installation and delivery, which the court viewed as critical to the "good faith" issue. The court was careful to point out that it was these facts which distinguished the case from Implement Credit Corporation v. Elsinger, 268 Wis. 143, 66 N.W. 2d 657 (1954), reh. den. 67 N.W. 2d 873 (1955) and other cases relied upon by appellee. The following statement of the court, at 137 N.W. 2d 178, clearly indicates the distinction between the issues involved both in that case and here:

> "We recognize that other decisions hold that where the assignee of a note and conditional sales contract has knowledge prior to purchase that the contract is for goods warranted or that the consideration is future or contingent, this does not prevent the assignee from becoming a holder in due course, if he has no knowledge of the breach or nonperformance of the contract provisions prior to his acquisition of the note and contract. /Citing Elsinger and other cases/ These decisions for the most part have reference to situations where an assignee of a note has knowledge of the executory consideration for it rather than knowledge that conditions are to be performed by the payee before liability attaches to the maker. /Citing cases./ Further, none of these involves a forged certificate of delivery and installation, as does the instant case, in which a forged certificate, as indicated, could not have eliminated the condition upon which the defendants' liability depended." (Emphasis supplied.)

From the foregoing, it can be seen that the International Finance case not only does not support appellants' position, but it also points up clearly the factual distinction between the cases relied upon by appellants and the facts here. It is this distinction which must cause appellants' argument to fail.

The case of Industrial Credit Company v. Mike Bradford & Co., Inc., (Fla.) 177 So.2d 878 (1965), cited at page 14 of appellants' brief, involves a number of facts not present here. Thus, in

Bradford the commercial paper was executed and assigned on the same day. Further, the paper was signed in the finance company's office and witnessed by the finance company's employees. Although the decision does not make this clear, it appears that the finance company and the debtor were dealing together directly at the time of the execution and assignment of the paper. These facts are completely different from the facts in our case where appellants and appellee never dealt directly with one another, where the paper was not executed in appellee's office, and where the paper was not sold to appellee until more than a month after the equipment was sold to appellants and the first mortgage executed.

Further, we submit that the decision in Bradford is unreliable because it is poorly reasoned and because it relies heavily upon other decisions which are not carefully analyzed as to the specific facts involved therein. The Bradford decision illustrates well that this is an area where a careless reliance on quoted excerpts from other court decisions is not an adequate substitute for a careful analysis of (a) all the facts in the case to be decided, (b) all of the facts behind, and the reasoning of, prior decisions, (c) the law involved and (d) the public policy behind that law.

A study of the cases in this area will show that a holder will not be deprived of holder in due course status because of a "combination of circumstances" by themselves insufficient to constitute bad faith, but rather, holder in due course status will be defeated only where there is fraud, or the holder has actively and directly participated as a party in the transaction between the maker and the payee, or has knowledge of

conditional liability on the part of the maker, which in effect constitutes knowledge of a defense which would keep the holder from being a holder in due course in any event under Section 52 of the N.I.L.

Appellants' case really boils down to an argument that appellee cannot be a holder in due course because it did not act in good faith. Appellants argue that they interpret the facts to be that appellee "actively participated" in the transaction between appellants and Fuline, and that this keeps appellee from being a holder in due course (i.e., that appellee was not acting in "good faith" under the N.I.L.). Appellants admit that the individual facts (even as interpreted by appellants) would not constitute "active participation" or "bad faith" so as to defeat appellee's position as a holder in due course. Appellants do contend, however, that the cases cited by them support their position that all of the facts considered together do constitute "active participation" (i.e., "bad faith") which will defeat appellee's position as a holder in due course.

The trouble with appellants' argument is that it is based upon (a) a distorted view of the facts of this case, (b) an inadequate analysis of the facts and reasoning of the applicable cases, and (c) a failure to realize that appellants are arguing that appellee was acting in "bad faith" under the standards of the N.I.L. What appellants seem to be saying is that appellee by a combination of circumstances (as interpreted by appellants) become a party to the original transaction between appellants and Fuline so as to defeat appellee's status as a holder in due course under the N.I.L. In so arguing, appellants fail to recognize that the

trial court specifically found that appellee "did not actively participate in the transaction" between appellants and Fuline "to the extent that it became a party to their transaction" and that appellee "did not otherwise lack 'good faith' in taking the notes" as required by the N.I.L. (R. 97).

Fundamentally, by their interpretation of the facts and their contentions as to the applicable law, the appellants are asking the court to make a ruling which would completely defeat the public policy behind the N.I.L. of "free flowing credit." This public policy has been continued by the widespread adoption of the Uniform Commercial Code. Appellants could have financed their purchase of machines by borrowing money from a bank, secured by notes and chattel mortgages (and perhaps by a guaranty of Fuline). In such a circumstance, the lender would clearly have been a holder in due course. Here appellants were able to purchase equipment because someone (namely appellee - but it could have been anyone) was willing to purchase appellants' notes and chattel mortgages. From a realistic point of view, the transaction was financed to the benefit of appellants by an independent third party which purchased appellants' paper in good faith, and the result in this case should be no different than if the paper had been given by appellants directly to a bank in exchange for a loan. No fraud is involved and no shady relationship exists between Fuline and appellee. To hold, under the circumstances of this case, that a financial institution cannot purchase commercial paper as a holder in due course from a dealer, would be to overturn the public policy of the N.I.L. that supports free flowing credit and would cause immense

difficulty to legitimate businesses (and especially small businesses) who seek to buy and sell goods on credit in the market place. As the court stated in Implement Credit Corporation v. Elsinger, 268 Wis. 143, 66 N.W. 2d, 657, 666 (1954):

> "We must take cognizance of the fact that a very large percentage of the sales of motor vehicles, farm machinery, electrical appliances, furnaces, and similar araicles are made by dealers to their customers on credit, whereby the purchaser makes a down payment in cash or trade-in and gives his negotiable note for the balance secured by a conditional sales contract or chattel mortgage. These notes usually provide for monthly installment payments extending over fairly long periods of time. Most dealers have not the capital to carry such notes and at the same time replenish their inventory stock so it is customary for them to discount such notes with a finance company or bank. A very considerable segment of our economy is dependent for its continued prosperity upon such free flow of credit, and anything which delays or impedes such process may well be regarded as against public interest."

Or as said in Cotton v. John Deere Plow Co., 246 Ala. 36, 18 So. 2d 727, 729 (1944) where an endorsee of a note was held to be a holder in due course in the face of a claimed breach of warranty:

> "The reason for the rule sustaining negotiability under circumstances as here is quite obvious. A substantial part of the credit business of the country is carried on with money raised by the discount of notes given upon such executory agreements or warranties, and to allow such a defense would destroy all confidence in such notes as negotiable paper, resulting in the paralysis of this character of business.
>
> "The opinion of Baker State Bank v. Grant, 54 Mont. 7, 166 P. 27, 28 (1917), well expresses the thesis: 'It has often been said that a negotiable promissory note is a courier without luggage whose face is its own passport. To such extent do notes of this character enter into and form a substantial part of the very life of the commercial world that the law has always been solicitous to exclude any rules calculated to hinder their free circulation

and exchange. By the act of executing such an instrument, the maker is held to have intended that it may enter the channels of trade and pass from hand to hand unincumbered by any defense not known to exist when the transfer is made.'"

We point out that our case does not in any way resemble the situation where a housewife has been fraudulently induced to purchase a washing machine without a motor by an appliance company who was assisted in selling the machine by its subsidiary finance company and which participated in the selling negotiations and in the seller's fraud to the extent that the finance company cannot be a holder in due course of the housewife's note for the purchase price. We are dealing with a large transaction between independent businessmen operating under the long established rules of the N.I.L. and with the expectations of the commercial community which have relied on those rules.

Looking at our case, the "original transaction" was the sale of the equipment between Fuline and appellants and the negotiation of their license agreement with one another. Obviously appellee did not have direct participation in this transaction and it certainly did not deal with appellants at any time prior to purchase of the notes.

Appellants would try to have us believe that approval given to Fuline of appellants' credit and an offer to Fuline to purchase appellants' commercial paper constituted active and direct participation throughout the original transaction. We submit this is in error and not only misreads even the judicial decisions relied upon by appellants, but also ignores the great weight of authority set forth in the decisions they don't agree with.

The applicable public policy is dealt with at page 114 of Braucher and Sutherland, Commercial Transactions (2nd Ed. 1958), which states:

> "The concept of the holder in due course makes good sense only in a world where people buy and sell debts freely without talking to the debtors. It comes up and makes a difference, usually, in hard cases: John Doe or Dealer was quite innocent and has suffered a grievous wrong. You will never understand the concept by matching the equities of Harvard Trust Company against those of John Doe in the hard case. You must bear in mind the thousands of cases where nothing goes wrong. The bank does not recover from Doe because it bargained for the fruits of Dealer's fraud: judges and other people do not think highly of bargains for the benefits of fraud. The bank recovers so that it will be willing to buy notes without taking time to check up the way people do when they buy land."

In applying the above quotation to our case "Doe" should be read as "appellants"; "Dealer" should be read as "Fuline"; and "Harvard Trust Company" and "Bank" should be read as "appellee."

Even if a few cases (largely involving small consumer credit and extensive fraud) have developed a fiction of "direct participation" to justify ignoring the well established requirements under the N.I.L. of what is needed to show "bad faith" of a holder, we contend that such fiction should not be applied in this case so as to create a precedent which would overturn the existing sound and well developed commercial practices of the business world which are solidly based on existing law and public policy.

While a few courts in cases involving blatant fraud or small consumer transactions may have examined facts carelessly or applied the law loosely in order to help the "little guy" against the "big guy," we submit that a holding for the appellants in the

industrial transaction involved in our case would not only be in disregard of the facts involved, but would also be contrary to the great weight of well reasoned authority and would create a precedent which would be contrary to the sound public policy of the N.I.L. concept of a holder in due course which supports "free flowing credit" in the "thousands of cases where nothing goes wrong."

III. SINCE APPELLEE PURCHASED THE NOTES FROM FULINE FOR VALUE, AND TOOK POSSESSION AND DELIVERY OF THE NOTES FROM FULINE, AND SINCE IT WAS UNDERSTOOD, AND INTENDED THAT THE NOTES WERE TO BE ENDORSED BY FULINE TO APPELLEE, APPELLEE'S STATUS AS A HOLDER IN DUE COURSE IS NOT DEFEATED BY THE FACT THAT THE PRINTED TEXT OF THE ENDORSEMENT ON EACH OF THE NOTES SHOWS THE NAME OF THE ENDORSEE TO BE "COMMERCE ACCEPTANCE COMPANY, INC."

N.I.L. Sec. 43 (R.C.W. 62.01.043; V.A.M.S. 401.043; O.R.S. 71.043 and K.S.A. 52-414) provides as follows:

> "Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described adding, if he think fit, his proper signature."

This statute clearly recognizes the principle that an endorsee who is a holder of an instrument which wrongly designates or misspells his name as endorsee does not thereby lose his status as a holder in due course. Among the cases applying this section of the N.I.L. [See, e.g., Atlanta & Lowry National Bank v. First National Bank of Carrollton, 38 Ga. App. 768, 145 S.E. 521 (1928); Time Loan Service, Inc. v. Bukowitz, 203 Md. 562, 102 A.2d 289 (1954); Jorgensen Chevrolet Co. v. First National Bank of Red Wing, Minnesota, 217 Minn. 413, 14 N.W. 2d 618 (1944); Joseph Milling Co. v. First Bank of Joseph, 109 Or. 1, 216 Pac. 560 (1923)] no case has been found where a wrongful designation or misspelling of an endorsee's name has been so applied as to cause an endorsee to lose his status as a holder in due course. From

the testimony and the findings of the trial court (R. 64, 83, 97), it is clear (a) that appellee was the actual and intended endorsee of the notes, (b) that its name was "wrongly designated or misspelled" within the meaning of N.I.L. Section 43, and (c) that the inadvertent error in designating appellee's exact name in the indorsement provided no basis for defeating appellee's status as a holder in due course.

For a detailed discussion on this point, we refer this court to the trial court's decision (R. 97-101) where a number of authorities are discussed and cited in support of the trial court's decision, including: 11 Am. Jur. 2d, Bills and Notes, Sec. 352, pp. 372-3 (1963); First Wisconsin Nat. Bank of Milwaukee v. People's Nat. Bank of Rocky Mount, Virginia, 136 Va. 276, 118 S.E. 82, 36 A.L.R. 736 (1923); Jorgensen Chevrolet Co. v. First National Bank of Red Wing, Minnesota, 217 Minn. 413, 14 N.W. 2d 618 (1944); First State Bank of Humbird v. Cox, 192 Wis. 566, 213 N.W. 290 (1927); Joseph Milling Co. v. First Bank of Joseph, 109 Or. 1, 216 Pac. 560 (1923).

Even if appellants were to argue that N.I.L. Sec. 43 does not apply to this case, it is clear that appellee would be a holder in due course by virtue of relevant provisions of N.I.L. Sec. 9. Thus, in Washington and Kansas, N.I.L. Sec. 9 has been codified, in part (R.C.W. 62.01.009; K.A.S. 52-209) to read:

> "The instrument is payable to bearer: ...
>
> "(3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; ..."

and in Missouri and Oregon it has been codified, in part (V.A.M.S.

401.009; O.R.S. 71.009) to read:

"The instrument is payable to bearer: ...

"(3) When it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable..."

Although Commerce Acceptance Company, Inc. was an existing corporation, the law relating to both of the above versions of this N.I.L. provision is well established that the payee named in an instrument will be deemed a fictitious person though designating an existing person, if there was no intent that he should have a beneficial interest in the paper. American Sash & Door Company v. Commerce Trust Co., 332 Mo. 98, 56 S.W. 2d 1034, 1040 (1933); Ritter v. Moore, 64 Ida. 144, 128 P.2d 639 (1942); Soekland v. Storch, 123 Ark. 253, 185 S.W. 262 (1916); Croswaite v. Pierce, 56 Wn. 2d 725, 355 P.2d 160 (1960); Goodyear Tire and Rubber Co. of California v. Wells Fargo Bank and Union Trust Company, 1 Cal. App. 2d 694, 37 P.2d 483 (1934); Portland Postal Employees Credit Union v. United States National Bank of Portland, 171 Or. 40, 135 P.2d 467 (1943). Applying this law to the facts of the present case, appellee would be the holder and the holder in due course of the notes as the bearer thereof.

That the "fictitious payee" doctrine of N.I.L. Sec. 9(3) applies to fictitious indorsees is made clear in a well reasoned, and well supported, decision, Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E. 2d 464 (1954) which did not involve a fictitious indorsee. The applicable rule is stated at page 696 of Britton On Bills and Notes (1943) as follows:

"If an instrument is made payable to the order of

> a designated payee whether such payee is a real person or a not-existing person and the person who made the instrument so payable, whether such person was the drawer himself, or an agent of the drawer or a forger of the drawer's name, and such person intends that the designated payee shall have no interest in the instrument and further intends that the person to whom he, in fact, issues the instrument shall have the interest therein, such instrument is treated just as if it were payable to bearer.
>
> Fictitious indorsees also fall within the above rule." (Emphasis added)

While the facts in Croswaite v. Pierce, 56 Wn. 2d 725, 355 P.2d 160 (1960), deal with a payee, the court at 355 P.2d 162 indicates that the same rule applies to indorsees when it states:

> "It is well settled that a 'fictitious' person within the meaning of the act, may be an actual person so long as the maker or endorser does not intend the named payee to receive the note or other negotiable instrument. Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E. 2d 464; . . . ." (Emphasis added).

Thus, appellants find themselves defeated on all sides. If they admit [as the court below found (R. 97, 64, 83)] that the name "Commerce Acceptance Company, Inc." was erroneously used to name appellee as endorsee of the notes, then appellee would be the endorsee and a holder in due course of the notes by virtue of the provision of N.I.L. Sec. 43 relating to misnomer. If appellants try to argue that, even though Commerce Acceptance Company, Inc. was not intended to be the endorsee of the notes, it nevertheless was an existing corporation, then appellants run afoul of the provisions of N.I.L. Sec. 9(3) which, under the facts of this case, would treat the notes as being payable to a fictitious person and thus payable to the bearer - i.e., appellee. Thus, it is clear that there was an endorsement to

appellee (either by misnomer or as bearer). For a similar case allowing alternative recovery under N.I.L. Sec. 43 or 9(3), see Atlanta & Lowry National Bank v. First National Bank of Carrollton, 38 Ga. App. 768, 145 S.E. 521 (1928).

In view of the preceding discussion, appellants' contention that the notes weren't regular on their face is obviously inapplicable. The notes were regular on their face and no evidence has been offered to the contrary. Appellants argue that the notes weren't regular on their face because of the erroneous (or fictitious) designation of the name of the endorsee on the endorsement on the rear of the notes. This argument is disposed of by the discussion above relating to the provisions of N.I.L. Sec. 43 and 9(3) and the case law applicable thereto. Appellants have cited no authority for applying the defense of "irregularity on face" to a case where either of N.I.L. Sections 43 or 9(3) are applicable.

Appellants contend that the law of Oregon is the choice of law rule to be applied here, and although the court below found no necessity for dealing with a conflict of laws issue since all four of the states involved had identical statutes at all times in question, since appellants raise the issue again we will discuss it here.

This being a diversity case there is no question but that the applicable choice of law is that which would be applied by the Oregon Courts. The Supreme Court of Oregon has clearly announced the basic choice of law rule for bills and notes in Oregon:

"In general, the place of performance of

> a bill or note, that is, the lex loci solutionis, is the place of payment. Where a bill or note is executed in one state and made payable in another, the general rule is that it is governed as to its nature, validity, interpretation and effect by the law of the state or county in which it is payable, without regard to the place where it was written, signed, or dated, unless it clearly appears that the parties intended the contract should be governed by the law of the place where it was made." Sterrett v. Stoddard Lumber Company, 150 Or. 491, 46 P.2d 1023 (1935).

Since Kansas was the state in which the notes were payable, that would seem to settle the question unless appelllants can show, which they do not attempt to do, that the parties clearly intended that the applicable law should be the place of execution of the notes, which incidentally, was Washington, not Oregon.

Appellants make much of the unreported case of Challenge-Cook Bros. Inc. v. Topline Equipment Company, Civil 63-278 (DC - Or. 1963), but the second paragraph of the court's opinion quoted by appellants, in which the court declined to apply the law of California where the note was payable, clearly illustrates that Judge Kilkenny did not reject the standard set forth by the Oregon Supreme Court in Sterrett. Although it is true that the secured property was located in Oregon, the note in that case was executed in Oregon, and the court undoubtedly found an intent on the part of the parties that Oregon law, the place of execution, should be applied. Nothing in the opinion suggests that the reason for applying Oregon law was the location of the secured property.

Perhaps more important in resolving that case, however, was the fact that it concerned the effect of the parol evidence rule which logically would follow the law of the state where the note was executed. That case did not involve the effect or

interpretation of a contract. In our case, the mere fact that some of the equipment subject to the mortgage was located in Oregon at the time of suit is by no means determinative of the conflicts question as applied to the notes secured by the mortgage. See, e.g., Oregon & W. Trust Investment Co. v. Rathburn, Fed. Cas. No. 10,555, 5 Sawy. 32 (C.C.A. Or. 1877). In any event, some of the equipment in our case was not located in Oregon, but in Washington.

The appellants' notes are the contracts involved in this case and appellants have shown no facts which would overcome the evidence that the contracts were made outside of Oregon. Applying any of the Oregon conflicts rules, it is clear that if the issue becomes pertinent at all, the law governing the holder in due course issue is not the law of Oregon.

Even if Oregon law were the governing law of this case, the one case relied upon by appellants /i.e., First National Bank of Pomeroy, Iowa v. McCullough, 50 Or. 508, 93 Pac. 366 (1908)/ is completely inapplicable herein for the following reasons:

(a) The notes in the McCullough case were delivered to Nixon, the named payee, and Nixon sent the drafts in payment therefor to the endorser. In our case appellee received delivery of the notes and paid the consideration therefor and Commerce Acceptance Company, Inc. had no connection whatsoever with the transaction.

(b) There was no endorsement in McCullough from Nixon to the Bank while, in our case, as indicated by the discussion above relating to N.I.L. Sections 43 and 9(3), there was an endorsement to appellee in fact, in

the intention of the parties and by operation of law. Endorsement of the notes by Commerce Acceptance Company, Inc. to appellee was not necessary under N.I.L. Sections 43 and 9(3) for appellee to be a holder in due course.

(c) In McCullough, Nixon was cashier of the Bank but the endorsement to Nixon did not indicate his capacity as cashier. The court in McCullough was concerned with N.I.L. Sec. 42 (see O.R.S. 71.042) which provides in part:

> "Where an instrument is drawn or indorsed to a person as 'cashier' or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation of which he is such officer..."

The defect in the McCullough note was that it did not show Nixon to be "cashier" and since the note was endorsed and delivered to Nixon but was not endorsed by Nixon to the Bank, the court held that this provision of the statute (i.e., N.I.L. Sec. 42) did not apply.

(d) The applicability of the provisions of N.I.L. Sections 43 (misnomer) and 9(3) (fictitious person) were not raised by the parties, and not considered by the court, in McCullough because Section 42 of the N.I.L. applied to the precise facts of a bank cashier receiving notes endorsed to himself.

Appellants misunderstand the McCullough case completely. In addition to the factual differences detailed above, the court there was not concerned with the same principles with which we are concerned here. Although the briefs filed in the case, to

which appellants refer, make it clear that the bank was the intended transferee, the court refused to consider the issue and struck testimony thereof, because it would violate the parol evidence rule to read the endorsement "Pay A. B. Nixon or Order" as making Nixon the endorsee only in his capacity as cashier. All of this discussion in McCullough was for the purpose of rejecting the application of Sec. 42 of the N.I.L., which is not applicable here in any event.

The essence of the court's holding in McCullough, after rejecting the application of Sec. 42, was that Nixon, not the plaintiff bank, must be considered the endorsee; that the note was transferred from Nixon to the bank without an endorsement; and that unless an instrument is "evidenced by an endorsement," which it was not by the court's reasoning in this case based on Sec. 42, the transferee bank took subject to personal defenses. Neither Section 43 nor Section 9(3) of the N.I.L. was considered in McCullough.

The trial court below correctly stated the precise holding in the case that:

> "The note sued on having been delivered by Nixon without endorsement, to the plaintiff, the bank was authorized to maintain an action thereon in its own name; but it took and held the paper subject to all equities existing in favor of the makers..." At p. 515. (Emphasis supplied.)

We submit that First National Bank of Pomeroy, Iowa v. McCullough, supra, is not only not applicable because of the conflict of laws rules discussed earlier, but also it has no application to the facts here. To apply appellants' interpretation of the applicable law and to ignore the obvious application of

N.I.L. Section 43 or Section 9(3) would completely defeat the policy of not only those sections but also the rest of the N.I.L. which seeks to promote commerce by protecting holders in due course.

Appellants have claimed that the notes were "indorsed" to Commerce Acceptance Company, Inc. We submit that the law and facts are clear that the notes were endorsed, and title as a holder in due course passed, to appellee. Appellants whole argument on this point of whether the notes were endorsed to appellee ignores the facts of this case and ignores the law applicable to these facts. Had Commerce Acceptance Company, Inc. given value for the notes (which it did not) and taken delivery of the notes (which it did not) and had Commerce Acceptance Company, Inc. been the intended endorsee (which it was not) and then delivered the notes to appellee (which it couldn't do because it never received the notes), then appellants' argument could be seriously considered. We must deal, however, with the actual facts and the law applicable thereto. In so doing, appellants' argument fails.

CONCLUSION

The judgment entered herein in favor of appellee should be affirmed.

Respectfully submitted,

BORDEN F. BECK, JR.
BLACK & APICELLA

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BORDEN F. BECK, JR.
Of Attorneys for Appellee

APPENDIX A

The following are the relevant provisions of the N.I.L. with citations given to those provisions (or the modifications thereof) as codified in Missouri, Washington, Oregon and Kansas. Abbreviated citations used are as follows:

Revised Code of Washington - R.C.W.

Vernons Annotated Missouri Statutes - V.A.M.S.

Oregon Revised Statutes - O.R.S.

Kansas Statutes Annotated - K.S.A.

N.I.L. Sec. 9 (R.C.W. 62.01.009; K.S.A. 52-209)

"When Payable to Bearer. The instrument is payable to bearer:

"(1) When it is expressed to be so payable; or

(2) When it is payable to a person named therein or bearer; or

(3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or

(4) When the name of the payee does not purport to be the name of any person; or

(5) When the only or last indorsement is an indorsement in blank."

N.I.L. Sec. 9 as modified in Missouri (V.A.M.S. 401.009) and Oregon (O.R.S. 71.009)

"When Payable to Bearer. The instrument is payable to bearer:

"(1) When it is expressed to be so payable; or

(2) When it is payable to a person named therein or bearer; or

(3) When it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee; or

(4) When the name of the payee does not purport to be the name of any person; or

(5) When the only or last indorsement is an indorsement in blank."

N.I.L. Sec. 42 (O.R.S. 71.042)

"Instrument drawn or indorsed to fiscal officer of a bank or corporation. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer."

N.I.L. Sec. 43 (R.C.W. 62.01.043; V.A.M.S. 401.043; O.R.S. 71.043; K.S.A. 52-414

"Indorsement in case of misspelled or wrongly designated name. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described adding, if he think fit, his proper signature."

N.I.L. Sec. 52 (R.C.W. 62.01.052; V.A.M.S. 401.052; O.R.S. 71.052; K.S.A. 52-502)

"What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

(3) That he took it in good faith and for value;

(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

N.I.L. Sec. 55 (R.C.W. 62.01.055; V.A.M.S. 401.055; O.R.S. 71.055; K.S.A. 52-505)

"What constitutes defective title. The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtains the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to fraud."

N.I.L. Sec. 57 (R.C.W. 62.01.057; V.A.M.S. 401.057; O.R.S. 71.057; K.S.A. 52-507)

"Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

N.I.L. Sec. 58 (R.C.W. 62.01.058; V.A.M.S. 401.058; O.R.S. 71.058; K.S.A. 52-508)

"Defenses against holders not in due course; rights of holder deriving title through holder in due course. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter."

N.I.L. Sec. 59 (R.C.W. 62.01.059; V.A.M.S. 401.059; O.R.S. 71.059; K.S.A. 52-509)

"Proof that a holder is a holder in due course. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some

person under whom he claims, acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

person under whom he claims, acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."